

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7<sup>th</sup> day of February, two thousand eleven.

PRESENT:

DENNIS JACOBS,  
*Chief Judge,*  
ROBERT D. SACK,  
DENNY CHIN,  
*Circuit Judges.*

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DAN-LEUNG ZHENG,  
*Petitioner,*

v.

09-4957-ag  
NAC

ERIC H. HOLDER, JR., U.S. ATTORNEY  
GENERAL,  
*Respondent.*

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FOR PETITIONER:           Waisim M. Cheung, Tsoi and  
Associates, New York, New York.

FOR RESPONDENT:           Tony West, Assistant Attorney  
General; Richard M. Evans, Assistant  
Director; Aliza B. Alyeshmerni,  
Trial Attorney, Office of

1                                   **Immigration Litigation, Civil**  
2                                   **Division, United States Department**  
3                                   **of Justice, Washington, D.C.**

1           UPON DUE CONSIDERATION of this petition for review of a  
2           decision of the Board of Immigration Appeals ("BIA"), it is  
3           hereby ORDERED, ADJUDGED, AND DECREED, that the petition for  
4           review is DENIED.

5           Petitioner Dan-Leung Zheng, a native and citizen of the  
6           People's Republic of China, seeks review of a November 4,  
7           2009, decision of the BIA, denying his motion to remand and  
8           affirming the January 31, 2008, decision of Immigration  
9           Judge ("IJ") Alan Page, denying his application for asylum,  
10          withholding of removal, and relief under the Convention  
11          Against Torture ("CAT"). *In re Dan-Leung Zheng*, No. A072  
12          468 331 (B.I.A. Nov. 4, 2009), *aff'g* No. A072 468 331  
13          (Immig. Ct. N.Y.C. Jan. 31, 2008). We assume the parties'  
14          familiarity with the underlying facts and procedural history  
15          of the case.

16          Under the circumstances of this case, we review both  
17          the IJ's and the BIA's decisions for the sake of  
18          completeness. *See Wangchuck v. DHS*, 448 F.3d 524, 528 (2d  
19          Cir. 2006). The applicable standards of review are well-  
20          established. *See* 8 U.S.C. § 1252(b)(4)(B); *Yanqin Weng v.*

1 *Holder*, 562 F.3d 510, 513 (2d Cir. 2009).

2 **I. Application for Relief**

3 **A. Asylum**

4 **1. Past Persecution**

5 Substantial evidence supports the IJ's adverse  
6 credibility determination with regard to Zheng's claim that  
7 he suffered past persecution on account of his "other  
8 resistance" to China's family planning policy.<sup>1</sup> As the IJ  
9 found, Zheng testified in his asylum interview that:

10 (1) when family planning officials came to his home to force  
11 his wife to have an abortion, he fled out the back door and  
12 hid with a friend; (2) five or six family planning officials  
13 came to his home to apprehend his wife; and (3) he learned  
14 of the forced abortion from a friend two days after it  
15 occurred. However, contrary to that testimony, Zheng  
16 testified at his merits hearings that: (1) in an attempt to  
17 block the officials from entering his home, he was "pushed  
18 aside" as he witnessed two officials "drag" his wife away,  
19 and he remained at his home until his wife returned the

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<sup>1</sup> Because Zheng filed his asylum application before May 11, 2005, the amendments made to the Immigration and Nationality Act by the REAL ID Act of 2005 do not apply to his asylum application. See Pub. L. No. 109-13, § 101(h)(2), 119 Stat. 231, 305 (2005).

1 following day; (2) only three family planning officials came  
2 to his home; and (3) he learned of the forced abortion when  
3 his wife returned from the hospital the following day, which  
4 led him to confront family planning officials at their  
5 office. Although minor and isolated discrepancies may be  
6 insufficient to support an adverse credibility finding, see  
7 *Diallo v. INS*, 232 F.3d 279, 288 (2d Cir. 2000), the  
8 discrepancies here relate to events at the heart of Zheng's  
9 claim—that he had suffered past persecution based on his  
10 "other resistance" to his wife's forced abortion. Thus, the  
11 IJ reasonably relied on the cumulative effect of these  
12 inconsistencies to call into question Zheng's credibility.  
13 See *Tu Lin v. Gonzales*, 446 F.3d 395, 402 (2d Cir. 2006)  
14 (emphasizing that "even where an IJ relies on discrepancies  
15 or lacunae that, if taken separately, concern matters  
16 collateral or ancillary to the claim, the cumulative effect  
17 may nevertheless be deemed consequential by the fact-  
18 finder"). (internal quotation marks and citations omitted)

19 Since the record supports the IJ's findings of  
20 conflicting testimony, the IJ was not required to credit  
21 Zheng's explanation that he omitted details of the  
22 altercation because he thought the incident was

1 insignificant and because the interpreter at the hearing had  
2 "cut off" his answers. *See Majidi v. Gonzales*, 430 F.3d 77,  
3 80-81 (2d Cir. 2005) (holding that the agency need not  
4 credit an applicant's explanations for inconsistent  
5 testimony unless those explanations would compel a  
6 reasonable fact-finder to do so). Moreover, the proffered  
7 explanation fails to account for inconsistencies about his  
8 initial reaction to the officials, the number of officials  
9 who came to his home, and how he learned of the forced  
10 abortion.

11 In finding Zheng not credible, the IJ also reasonably  
12 relied on Zheng's failure to provide credible, corroborating  
13 evidence in support of his claim that he had suffered past  
14 persecution. *See Biao Yang v. Gonzales*, 496 F.3d 268, 273  
15 (2d Cir. 2007) (holding that an applicant's failure to  
16 corroborate his testimony may bear on credibility, either  
17 because the absence of particular corroborating evidence is  
18 viewed as suspicious, or because the absence of  
19 corroboration in general makes an applicant unable to  
20 rehabilitate testimony that has already been called into  
21 question).

22 Because the IJ's adverse credibility determination was

1 reasonable and is dispositive of his claim of past  
2 persecution, we do not reach Zheng's challenges to the  
3 agency's findings that he failed to meet his burden of  
4 proof.

## 5 **2. Well-Founded Fear of Future Persecution**

6 Because Zheng failed to demonstrate that he had  
7 suffered past persecution, he was not entitled to a  
8 presumption of a well-founded fear of future persecution.  
9 See 8 C.F.R. § 1208.13(b). Absent past persecution, an  
10 applicant can demonstrate eligibility for asylum based on a  
11 well-founded fear of future persecution by demonstrating  
12 that he subjectively fears persecution and that this fear is  
13 objectively reasonable. *Ramsameachire v. Ashcroft*, 357 F.3d  
14 169, 178 (2d Cir. 2004).

### 15 **i. Family Planning Policy**

16 The agency reasonably found that Zheng failed to  
17 demonstrate a well-founded fear of persecution because the  
18 evidence he submitted did not indicate that forcible  
19 sterilizations are mandated in Fujian Province after the  
20 birth of a second child. As the BIA observed, the evidence  
21 Zheng submitted was similar to that which it addressed in  
22 *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007). We have

1 previously reviewed, and found no error in, the BIA's  
2 analysis in that case. *Jian Hui Shao v. Mukasey*, 546 F.3d  
3 138 (2d Cir. 2008).

4 Furthermore, contrary to Zheng's assertions, the agency  
5 sufficiently considered all of the evidence he submitted,  
6 and adequately explained its findings. *See Wei Guang Wang*  
7 *v. BIA*, 437 F.3d 270, 275 (2d Cir. 2006) (holding that the  
8 agency is not required to "expressly parse or refute on the  
9 record each individual argument or piece of evidence offered  
10 by the petitioner" as long as it "has given reasoned  
11 consideration to the petition, and made adequate findings").  
12 (internal quotation marks omitted) The IJ also reasonably  
13 gave minimal weight to the letter and sterilization  
14 certificates Zheng submitted from a fellow Changle villager  
15 and from a relative. *See Xiao Ji Chen v. U.S. Dep't of*  
16 *Justice*, 471 F.3d 315, 342 (2d Cir. 2006) (finding that the  
17 weight afforded to the applicant's evidence in immigration  
18 proceedings lies largely within the discretion of the  
19 agency).

## 20 **ii. Religion**

21 The agency also reasonably found that Zheng failed to  
22 demonstrate an objectively reasonable well-founded fear of

1 persecution based on his Christian religion. Contrary to  
2 Zheng's assertion, the agency did not erroneously apply a  
3 higher standard of proof by requiring him to demonstrate  
4 both an individualized fear of persecution and a pattern or  
5 practice of persecution. See 8 C.F.R. §§ 208.13(b)(2),  
6 208.16(b)(2); *Mufied v. Mukasey*, 508 F.3d 88, 91 (2d Cir.  
7 2007) (holding that an applicant shall not be required to  
8 demonstrate that he would be singled out for persecution if  
9 he demonstrates a pattern or practice of persecution of a  
10 group on account of a protected ground and his own inclusion  
11 in or identification with that group). Rather, the IJ found  
12 that Zheng failed to demonstrate either that he would be  
13 individually singled out for persecution or that there was a  
14 pattern or practice of persecution.

15 The IJ reasonably found that Zheng failed to establish  
16 a pattern or practice of persecution of Christians similarly  
17 situated to him. See *Mufied*, 508 F.3d at 91; see also  
18 *Santoso v. Holder*, 580 F.3d 110, 112 (2d Cir. 2009) (holding  
19 that the agency's finding of no pattern or practice is sound  
20 where it is sufficiently supported by the background  
21 materials). As the IJ found, the State Department's 2007  
22 Profile report, (unlike the 2004 Profile report) did not



1 indicate that any suppression of house churches in Fujian  
2 amounted to persecution. Recent State Department and news  
3 reports indicate that, because Fujian is rural and located  
4 in the south, unlike Beijing or Shanghai, it was unlikely  
5 that the Chinese government would target Zheng's church for  
6 suppression. That substantial evidence supports the IJ's  
7 finding that there was no pattern or practice of  
8 persecution, and that finding supports the conclusion that  
9 Zheng failed to qualify for withholding of removal. *Diallo*,  
10 232 F.3d at 287 (holding that this Court will "reverse [the  
11 BIA] only if no reasonable fact-finder could have failed to  
12 find the past persecution or fear of future persecution  
13 necessary to sustain the petitioner's burden").

14 Accordingly, because the agency's determination that  
15 Zheng failed to show past persecution or a well-founded fear  
16 of future persecution is supported by substantial evidence,  
17 there is no merit to his challenge to the denial of asylum.  
18 8 U.S.C. § 1252(b)(4)(B); see also *Corovic v. Mukasey*, 519  
19 F.3d 90, 95 (2d Cir. 2008)

#### 20 **B. Withholding of Removal and CAT Relief**

21 To the extent that Zheng asserts that he established  
22 his eligibility for asylum, withholding of removal, and CAT

1 relief based on his "other resistance," the IJ's reasonable  
2 adverse credibility determination defeats all three claims  
3 because they were based on the same factual predicate. *Paul*  
4 *v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006). Similarly,  
5 because Zheng was unable to establish the objective  
6 likelihood of persecution needed to make out an asylum claim  
7 based on the birth of his two children or his Christian  
8 beliefs, he was necessarily unable to satisfy the higher  
9 standard required to succeed on his claims for withholding  
10 of removal and CAT relief, as all three claims rested on the  
11 same factual predicate. *Id.*<sup>2</sup> Zheng has waived any  
12 challenge to the IJ's denial of CAT relief based on his  
13 illegal departure from China, general prison conditions, or  
14 his Christian religion.

## 15 **II. Motion to Remand**

16 We review the BIA's denial of a motion to remand for  
17 abuse of discretion. *Li Yong Cao v. U.S. Dep't of Justice*,

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<sup>2</sup> Zheng argues that the IJ failed to apply *Ramsameachire* to his decision denying CAT relief. However, the IJ discussed *Ramsameachire* in his decision and found, apart from his adverse credibility determination, found that Zheng failed to meet his burden of demonstrating a likelihood of torture based on the birth of his two children. See *Ramsameachire*, 357 F.3d at 184-85.

1 421 F.3d 149, 157 (2d Cir. 2005). An abuse of discretion  
2 may be found where the BIA's decision "provides no rational  
3 explanation, inexplicably departs from established policies,  
4 is devoid of any reasoning, or contains only summary or  
5 conclusory statements; that is to say, where the Board has  
6 acted in an arbitrary or capricious manner." Id.

7 The BIA did not abuse its discretion in denying Zheng's  
8 motion to remand based on his pending I-130 visa petition.  
9 As Zheng conceded in his motion to remand, the United States  
10 Citizenship and Immigration Services has sole jurisdiction  
11 to adjudicate his adjustment of status application. See  
12 8 C.F.R. § 245.2 (2006). Because the IJ could not have  
13 taken any action to adjudicate Zheng's adjustment of status  
14 application, the BIA's denial of the motion was not  
15 arbitrary or capricious.

16 For the foregoing reasons, the petition for review is  
17 DENIED. As we have completed our review, any stay of  
18 removal that the Court previously granted in this petition  
19 is VACATED, and any pending motion for a stay of removal in  
20 this petition is DISMISSED as moot. Any pending request for  
21  
22

1 oral argument in this petition is DENIED in accordance with  
2 Federal Rule of Appellate Procedure 34(a)(2) and Second  
3 Circuit Local Rule 34.1(b).

4 FOR THE COURT:  
5 Catherine O'Hagan Wolfe, Clerk  
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